RECORD
AND
BRIEFS

No. 10-1093

Supreme Court, U.S.
FILED
JUN 6 - 2011
OFFICE OF THE CLERK

In The

Supreme Court of the United States

JOSEPH SMITH and SONYA SMITH,

Petitioners,

v.

STATE OF GEORGIA,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of The State Of Georgia

PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

SAMUEL JOSEPH HARRIS
Counsel of Record
320 East Broad Street, Suite 200
Cookeville, Tennessee 38501
(931) 854-0237
sjharrislaw@hotmail.com

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

Library of Congress
Law Library

TABLE OF CONTENTS

Page

Argument in Reply 1

Conclusion 6

Appendix

In the Georgia Supreme Court, Petitioners' Supplemental Brief 1a

ARGUMENT IN REPLY

JOSEPH AND SONYA SMITH have petitioned this Court for a writ of certiorari to review the order of the Georgia Supreme Court denying their appeal from a Cobb County, Georgia denial of a new trial in a case resulting in a life plus thirty years sentence. Petitioners have contended, *inter alia*, that they were denied a fair trial when the government's attorney held a birthday party for the deceased child victim in front of the jury during the final moments of the rebuttal portion of closing argument.

In support of their petition, petitioner gave three reasons why certiorari should be granted:

> 1. This case affords the ideal opportunity to address the prosecutorial misconduct in a closing argument where the prosecutor deliberately stages conduct and words calculated to appeal to jurors' emotions because the Georgia Supreme Court opinion conflicts with other jurisdictions.
>
> 2. The issue of prosecutorial misconduct is a regularly occurring issue in criminal trials across the country and thus the Court can address an issue of national importance.
>
> 3. This case affords the ideal opportunity to address whether defense counsel's failure to object in the face of obvious, ongoing prosecutorial misconduct can be justified by merely claiming "strategy" or "tactics."

The Respondent, State of Georgia, chose not to address directly these reasons presented by the petitioner. The Petitioners will respond below to each of Respondent's beliefs as to why the writ should not be granted as the brief in opposition is unpersuasive.

A. THE ISSUE OF THE TRIAL COURT'S FAILURE TO STOP THE "HIGHLY INAPPROPRIATE" APPEAL TO JUROR SYMPATHY AS BEING A VIOLATION OF DUE PROCESS WAS RAISED AND DISCUSSED BEFORE THE GEORGIA SUPREME COURT.

The Respondent is incorrect to argue to this Court that the issue of whether the Trial Court's failure to stop the State's attorney inflammatory closing *sua sponte* was a due process violation is being raised for the first time in this petition. (Respondent's Brief in Opposition, p. 7). Even if the Court decided that the trial court's failure to act *sua sponte* was not raised before this petition, the ineffective assistance of counsel aspect of this issue would be unaffected.

It is an incredible assertion in light of the fact that Respondent acknowledges that Petitioner Sonya Smith enumerated as one of her errors on direct appeal the following:

* * *

> (2) the trial court erred in allowing the prosecutor to dim the lights in the courtroom, bring out a cake with lit candles, and sing "Happy Birthday" to the deceased victim during her closing argument.

(Respondent's Brief in Opposition, p. 2).

Respondent points out that in a supplemental brief that the Georgia Supreme Court granted permission to file following oral argument the first issue raised clearly states that the issue of a due process violation was part of the argument being made. (See Appendix attached hereto, Supplemental Brief of Joseph Smith). Yet the Respondent treats this briefing as not raising the issue. The supplemental brief allowed the Georgia Supreme Court to more fully grasp and consider the issue of the trial court's failure to maintain fundamentally fair proceedings. Therefore, the issue of due process is not being raised for the first time at this Court.

The supplemental brief could not have been clearer when Petitioner Joseph Smith argued, "[t]he flagrant appeal to juror sympathy corrupted the concept of fair trial implicit in the *Due Process Clause of the Fourteenth Amendment.*" (App. 9a, Supplemental Brief of Joseph Smith).

Finally, the opinion of the Georgia Supreme Court clearly addresses the issue of the trial court erring in allowing the "highly inappropriate"[1] closing argument. The Georgia Supreme Court sidestepped the issue by stating it would not consider plain error and noted that trial counsel had not objected. (Petition for

---

[1] The Georgia Supreme Court stated in its opinion below that it "frowns upon the prosecutor's antics and finds them to be highly inappropriate." (Petition for Writ of Certiorari, App. 12).

Writ of Certiorari, App. 3-4). Nevertheless the concept of the due process being raised is implicit in the first section of the dissent by Chief Justice Hunstein. (Petition for Writ of Certiorari, App. 17-23). The dissent makes clear that the lack of fundamental fairness of the closing argument antics was raised both as failure on the part of both trial court and defense trial counsel.

The issue of the trial court's failure to stop the highly inappropriate antics, as well as ineffective assistance of counsel for failure to object, is properly before the Court.

B. PETITIONERS ARE NOT ASKING THIS COURT TO OVERRULE ANY LONG-STANDING PRECEDENT.

The Respondent's argument is based on desired, boilerplate conjecture. It is not clear what long-standing precedent the Respondent claims the Petitioners seek to have overruled. The Petitioners know of no United States Supreme Court case that would justify a prosecutor to stage an elaborate appeal to sympathy by holding a birthday party for the deceased victim in a murder case in closing argument, and further approve defense trial counsel's silence in the face of such highly inappropriate antics.

Indeed Petitioners seek the enforcement of long-standing precedent that trials be fair and not circuses that appeal to emotion. The Petitioners are asking the Court to provide guidance on prosecutorial

misconduct in closing argument and on effective assistance of counsel in objecting to the misconduct rather than relying on a pretextual strategy of silence. The Court may clarify its previous rulings, but the Petitioners cannot imagine the Court would overrule any prior cases.

C. THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM IS NOT "FACT-INTENSIVE" – BOTH IN GENERAL AND IN COMPARISON TO ANY OTHER CASE THAT WOULD BE BROUGHT BEFORE THIS COURT.

The underlying case involves a real factual dispute about the cause of the death of a child in a criminal case. The case is no more fact-intensive than any other case brought before this Court.

There is also no factual dispute about the antics in closing argument by the prosecutor. Nor is there a factual dispute as to a claim of strategy by defense counsel. This Court would be called upon to consider the reasonableness of the failure to object so as not to call further attention to the circus-like, prosecutor-created atmosphere in closing argument or in hopes that the jury will do defense counsel's job and hold the appeal to sympathy against the State. However, this assessment of facts is not exceptionally intensive.

In short, this argument is meaningless.

This Court should grant the writ of certiorari in this case so that an obvious injustice can be avoided

and so that judges, prosecutors, and defense counsel can have guidance as to when misconduct in closing argument crosses the line.

CONCLUSION

For the foregoing reasons, and for the reasons discussed more fully in their Petition, JOSEPH AND SONYA SMITH pray that this Court grant their petition for a writ of certiorari, and reverse the judgment below.

Respectfully submitted,

SAMUEL J. HARRIS
Counsel for Joseph and Sonya Smith
320 East Broad Street, Suite 200
Cookeville, Tennessee 38501
(931) 854-0237

IN THE SUPREME COURT OF GEORGIA

JOSEPH SMITH, APPELLANT v. STATE OF GEORGIA APPELLEE	))))))	Case No. S10A1282 DIRECT APPEAL FROM COBB COUNTY

SUPPLEMENTAL BRIEF OF APPELLANT, JOSEPH SMITH

CHARLES V. GANDY, JR.
Georgia State Bar #283650
725 Windy Hill Road
Smyrna, GA 30080
770-436-6336

SAMUEL J. HARRIS
Pro Hac Vice
Tennessee Bar #017392
320 East Broad Street #200
Cookeville, TN 38501
931-854-0237

SUPPLEMENTAL ARGUMENT

The Defendants' due process rights and their Sixth Amendment right to effective legal counsel were denied by the prosecutor's intentional, outrageous appeal to the jury's emotions and sympathies by the State's attorney lighting a

birthday cake and singing "Happy Birthday" to the Defendants' dead son in the final words/ stunt before jury deliberation.

In the rebuttal portion of closing argument, Assistant District Attorney ("ADA") Eleanor Dixon said ***and sang*** (the singing portion will be in italics) the following while an actual birthday cake and eight candles were burning, having been lit by State's counsel:

> I was thinking about something the other day. I was thinking about birthdays. *Happy birthday to you. Happy birthday to you. Happy birthday dear Josef. Happy birthday to you.*
>
> There are eight candles on that cake. But you know what's not on there? One more candle for his 9th birthday, because he didn't get to see that. You may think that's harsh, but it's true. And it was at the hands of those people.
>
> You are the voice of the community. You can stand up and say to Cobb County, We do not let parents abuse their children to the point in which they die. You, as the community, can say that. We don't accept this behavior in our community. This is not what we do to children.
>
> When you were sworn in as jurors, you took an oath to render a verdict which speaks the truth. And a verdict which speaks the truth in this case is a verdict of guilty on each and

> every count in the Indictment. **Speak the truth for little Josef**[1].

(T- Volume 8, State's Closing Argument on February 14, 2007, p. 69-70) (Emphasis added).

At the motion for new trial hearing, Manubir Arora described the events and his reaction as follows:

> Q. I think I know the answer to this next question but I'll ask you to make the record. Why didn't you object to the birthday cake stunt?
>
> A. I think I was just stunned about it. I **had never had a prosecutor go to that extent where she clicked her finger, one of the deputies turned out the lights and her associate popped out a cake out of a grocery bag and they just started singing** but the birthday had already come and gone and I understand the cameras were rolling and everybody wants to be Nancy Grace's friend but I was so stunned by it. I didn't want to call any more attention because I thought it was so absurd I was hoping it would turn the jurors off. That was the only thing I could think of but I couldn't come up with a rational reason except for this is so

---

[1] As to the remark, "Speak the truth for little Josef", it is well settled that it is improper to ask the jury to imagine themselves in the victim's place. ***Pace v. State***, 271 Ga. 829, 844, 524 S.E.2d 490 (1999).

> preposterous, I object. **I couldn't come up with a law because I was stunned.**

Testimony of Manubir Arora, Hearing for Motion for New Trial on February 20, 2009, p. 41-42

The Court has allowed this supplemental briefing as to caselaw regarding egregious closing arguments.

Looking first to persuasive authority from other jurisdictions of where the sheer flagrant nature of the appeal to passion and prejudice lead to reversal, the Appellant, Joseph Smith, would direct the Court's attention to ***State of South Carolina v. Northcutt***, 372 S.C. 207, 641 S.E.2d 873 (2007). The Supreme Court of South Carolina held, *inter alia*, the State's improper comments and action during closing argument of sentencing phase constituted reversible error. The *Northcutt* court found that the State had infected the jury's deliberations with passion and prejudice so as to require reversal. The solicitor concluded his argument in a child murder case by producing a large black shroud and draping it over the baby's crib and then staged a funeral procession for the jury. Trial counsel had not objected at trial.

In ***State v. Lockhart***, 24 Kan. App. 2d 488, 947 P.2d 461 (1997), the prosecuting attorney called the defendant and defense counsel liars and the defendant a drug dealer in an attempt to appeal to the jury's passions . The court in reversing and remanding for a new trial stated that "[j]uries must be given an opportunity to exercise reason and sound judgment in deciding the facts of a case, free from passion and

prejudice." *Lockhart*, 24 Kan. App. 2d at 492, 947 P.2d 463. The court noted that it could not conclude beyond a reasonable doubt that the prosecutor's statements had no effect on the jury's decision.

In ***United States v. Payne***, 2 F.3d 706 (6th Cir. 1993), the Sixth Circuit Court of Appeals reversed a conviction where the prosecutor made deliberate, improper closing argument referencing Christmas and the plight of poor people as a calculated effort, at a trial held shortly before Christmas, to evoke strong sympathetic emotion for the victims. The court found that there was prejudice to the Defendant despite objection and curative instructions.

The controlling authority most relevant to the present case is ***Bell v. State***, 263 Ga. 776, 439 S.E.2d 480 (1994). In *Bell*, this Court reversed a conviction because prosecutor in drug trial closing argument referred to a well-known murder case and a rape case. Justice Benham wrote for the Court in Bell the following (with emphasis added):

> [T]he court must not allow such latitude as will defeat the justice of the cause, such as introducing prejudicial matters not in evidence. ***The dignity of the court, and the public interest in having its courts properly conducted, are involved. Brooks v. State***, 262 Ga. 242, 416 S.E.2d 518 (1992) (where the prosecutor's reference in closing argument in a murder case to a widely-publicized murder was not enumerated as error), and ***Cooper v. State***, 260 Ga. 549,

> 397 S.E.2d 705 (1990) (where the prosecutor's reference in closing argument in a murder case to a well-known murder and to a notorious sexual assault was not the subject of a motion for mistrial or a request for curative instructions).
>
> We take this opportunity to reiterate that the wide range of discussion permitted in closing argument does have its limitations, the first and foremost of which is the longstanding ***prohibition against "'the injection into the argument of extrinsic and prejudicial matters which have no basis in the evidence.'" Conner v. State***, 251 Ga. 113, 303 S.E.2d 266 (1983), quoting ***Floyd v. State***, 261 Ga. 766, 410 S.E.2d 725 (1991). By referring to such extraneous and prejudicially inflammatory material in her closing argument, the prosecutor exceeded the wide latitude of closing argument, to the detriment of the accused and to the detriment of the fair administration of justice.

The present case involves conduct far more flagrant and inflammatory than the acts referenced in *Bell*. The prosecutor in the present case scripted, pre-planned, and musically scored the diversion of the jury's attention from whether the Defendant was a mere victim of staph infection to an emotional based decision that the parents had abused and killed their child.

The "Happy Birthday" closing was not an isolated or inadvertent act or word over the course of a hard

fought case. The message that should be sent is that when a prosecutor pre-plans to inject emotion into closing argument; such intentional misconduct will be met with reversal as it violates the due process right to a fundamentally fair trial. Otherwise prosecutors will know that they can go to extremes, and even then, might not be held accountable for corrupting fair, objective, unemotional fact evaluation by a sworn jury.[2]

This highly improper appeal for the jurors to give emotional consideration to the victim in the guilt-innocence phase and for the jurors to put themselves in the place of the victim can only be fully understood by viewing the video recording.[3]

The starting point for analysis is to look at the obligations of the prosecutor in giving a closing argument.

> [A prosecuting attorney] is the representative not of an ordinary party to a controversy,

---

[2] There is no doubt that the vast majority of cases considering the issue of prosecutorial misconduct are held not to be reversible error. The present case is distinguishable by the sheer deliberateness and intense flagrancy which involves more than a mere isolated, poor choice words. The issue is raised far more than the cases cited here which, in and of itself, suggests that prosecutors are not restrained by the rule prohibiting appeals to sympathy and emotion.

[3] The video was submitted at the motion for new trial hearing on February 5, 2009 as Exhibit 1. (R- p. 314). The video of the closing argument was submitted under seal for inclusion in the court record.

> but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. **It is as much his duty *to refrain from improper methods* calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.**
>
> It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, ***improper suggestions, insinuations, and, especially, assertions of personal knowledge*** **are apt to carry much weight against the accused when they should properly carry none.**

Berger v. United States, 295 U.S. 78, 88 (1935) (emphasis added).

In less poetic language, the American Bar Association Standards for Criminal Justice 3-5.8 (2d ed. 1980) provides:

(a) In closing argument to the jury, the prosecutor may argue all reasonable inferences from evidence in the record. The prosecutor should not intentionally misstate the evidence or mislead the jury as to the inferences it may draw.

(b) The prosecutor should not express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant.

(c) The prosecutor should not make arguments calculated to appeal to the prejudices of the jury.

(d) The prosecutor should refrain from argument which would *divert the jury* from its duty to decide the case on the evidence.

The actions of the Assistant District Attorney in the rebuttal rebuttal portion of closing argument are far outside the parameters of the *Berger*'s or the ABA's concept of a fair prosecution; indeed it is so outrageous and improper that no court should accept singing and showmanship of this nature with no real relevance to the evidence. The flagrant appeal to juror sympathy corrupted the concept of a fair trial implicit in the *Due Process Clause of the Fourteenth Amendment*. The final, over-the-top scene of the rebuttal in the present case was plain error such that the trial court should have stopped the State before the ADA sang the first note much less an entire chorus, before the first candle rather the eighth was lit.

Violations of the Fourteenth Amendment occur when something "so infects the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986). Because the stunt was submitted to jury during rebuttal of closing argument the Defendants had no opportunity to even be heard on the matter of whether the jury should properly consider the State's proposition that the victim did not get to have a 9th birthday.

Further the Sixth Amendment of the United States Constitution was implicated by defense counsel's failure to object. Georgia courts "have recognized that trial counsel's failure to object to improper argument can constitute deficient performance. ***Williams v. State***, 261 Ga.App. 511, 583 S.E.2d 172 (2003) (citing to *inter alia* ***Mason v. State***, 274 Ga. 79, 548 S.E.2d 298 (2001)).

No evidence was entered at trial regarding cakes or candles or singing. The prosecuting attorney's only objective was to inject emotions into the jury just as they begin deliberation. The State's flagrant violation is so overwhelming that there is a reasonable probability that the jurors deliberated and decided the case with a background of an emotional need to ensure that the victim be vindicated. Such emotion often tips the balance and unfairly compromises a verdict thus denying the Defendants' due process.

This evidence in this case was not overwhelming. The Defense presented a viable theory that the child

died as the result of staph infection from infected scratching due to eczema. The Defense presented expert testimony to support this theory. The Defense showed video of the child playing at a summer camp, and incidentally scratching his leg. (T- Vol. 6A, February 12, 2007, Exhibit 8, p. 33).

The Defense would present a claim centered on the cause of death being attributable to staph infection from the scratch wounds due to eczema rather than any human caused injury. Dr. Cheryl Burgess, an Assistant Clinical Professor at Georgetown University and George Washington University, testified that the wounds and markings on the victim's body were due to eczema and scratching associated therewith. (T- Vol. 6B, February 12, 2007, p. 43.84). Dr. Burgess noted that based on the white blood cell count and the fever of 102.5 degrees, an infection was present in the child. (T- Vol. 6B, February 12, 2007, p. 104-105, 108).

Dr. Thomas Sporn, an assistant professor in Pathology at Duke University and former Assistant Chief Medical Examiner for the State of North Carolina, testified on behalf of the defense. (T- Vol. 6A, February 12, 2007, p. 66, 69). Based on his review of the autopsy reports, glass slides taken by the pathologist, photographs, and other documentation, Dr. Sporn rejected Dr. Frist's theory of blunt force injuries to the head. (T- Vol. 6A, February 12, 2007, p. 70-73). Dr. Sporn acknowledged it would be difficult to put "a struggling, healthy child in a box with dimensions" as the box shown in the courtroom.

(T- Vol. 6A, February 12, 2007, p. 85). He noted the lack of trace evidence on the body such as flecks of paint or wood splinters that would be expected if the body had been placed in the box. (T- Vol. 6A, February 12, 2007, p. 86-88).

CONCLUSION

Wherefore, based on the foregoing, the Appellant asks this Court to reverse the trial court's order denying a new trial and remand this case back to the trial court so that Joseph and Sonya Smith can have a fair trial without extraneous appeals to sympathy that compromise due process.

Respectfully submitted,

Samuel J. Harris, Tennessee Board of Professional Responsibility #017392
Counsel *pro hac vice* for Joseph Smith
320 East Broad Street, #200
Cookeville, TN 38501
931-854-0237

[Certificate Of Service Omitted In Printing]